FILE COPY

Office-Supreme Court, U.S.
FILED
NOV 2 1960
JAMES R. BROWNING, Clerk

No. 462

In the Supreme Court of the United States

OCTOBER TERM, 1960

CHARLES G. RHODES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM RICHARD WILKEY,
Assistant Attorney General,
BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys,
Department of Justice, Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 462

CHARLES G. RHODES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Vol. III, 35–42; Pet. 34–40)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1960 (Pet. 42–43). Mr. Chief Justice Warren extended the time for filing a petition for a writ of certiorari to October 10, 1960, and the petition was filed on October 3, 1960 (Pet. 44). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The record consists of three separately paginated volumes. Volume II constitutes the reporter's transcript of the trial and will be referred to as "Tr." Volumes I and III contain the proceedings in the district court and the court of appeals.

872880—60

QUESTIONS PRESENTED

1. Whether, in a trial for willfully making false statements, the trial court properly refused to permit a psychiatrist to state whether in her view the petitioner knowingly made false statements.

2. Whether petitioner had a fair trial.

STATUTE INVOLVED

18 U.S.C. 1014 provides in pertinent part:

> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of * * * a Federal Savings and Loan Association * * * upon any application, * * * or loan, * * * shall be fined not more than $5,000 or imprisoned not more than two years, or both.

STATEMENT

In the District Court for the Southern District of West Virginia, petitioner was convicted of willfully filing false statements and reports with the Huntington Federal Savings and Loan Association in order to obtain a $20,000 loan, in violation of 18 U.S.C. 1014, *supra* (Vol. I, 4–3; Tr. 277–279). On January 4, 1960, petitioner was sentenced to serve a prison term of twenty-two months and to pay a fine of $3,000 (Vol. I, 14; Pet. 25–26). On appeal, the conviction was affirmed, one judge concurring in the result (Pet. 34–40).

The evidence showed that, from about 1948 to about 1958, petitioner, who owned a real estate business in Huntington, West Virginia, managed and collected rents of the Ashworth Apartments in Huntington.

owned by Dr. Glen C. Dowell, a resident of Ohio. In December 1954, petitioner obtained a $20,000 loan from the Huntington Federal Savings and Loan Association secured by a deed of trust on the Ashworth Apartments (Tr. 6–7, 9–11, 51–54, 64–67, 90, 125). Petitioner signed the name "Glen C. Dowell" on a $20,000 promissory note to the savings and loan association, on a deed of trust, and on a check representing the proceeds of the loan. At petitioner's request, one of his employees signed the name "Norma L. Dowell" (the wife of Dr. Dowell) to these documents (Tr. 99–103, 119; see Tr. 107–108).

Dr. and Mrs. Dowell were unaware that a loan had been made on their Huntington property or that their names were signed to the note, check and deed of trust (Tr. 64–68, 90, 92–95, 125). Dr. Dowell testified that petitioner was authorized to make minor repairs up to $500 or $600, but that major repairs and expenditures had to be approved by the doctor (Tr. 80–85).

ARGUMENT

1. At the trial, petitioner sought to introduce the testimony of Dr. Thelma V. Owen, a psychiatrist who had interviewed the petitioner for one hour on each of two occasions in November 1959. Knowing that there would be objection, the court heard the testimony in the absence of the jury (Tr. 181). After establishing the witness's qualifications, petitioner's counsel asked the following questions (Tr. 189–190):

> Q. Now I will ask you, Doctor Owen, based upon your psychiatric examination and study of Charles Rhodes, in your opinion did Charles

> Rhodes knowingly make a false statement when he signed the name of Glen C. Dowell and caused the name of Norma L. Dowell to be made to a deed of trust and note and delivered them to the Huntington Federal Savings and Loan Association on December 31, 1954?
>
> * * * * *
>
> Q. Based upon your psychiatrist examination and study of Charles Rhodes, in your opinion did he knowingly forge the name of Glen C. Dowell and knowingly cause the name of Norma L. Dowell to be forged to the said note and deed of trust?

The doctor's answer was merely that in her opinion petitioner did not. The court held the testimony inadmissible.

The ruling was clearly correct. The questions were improper in substance in that they assumed that Dr. Owen, a psychiatrist, understood the legal definition of "knowingly" as used in the statute and called upon her to pass upon petitioner's guilt without reference to the evidence adduced at the trial. Moreover, no factual basis for the opinion of Dr. Owen was established. She was not asked, nor did she state anything about the mental capacity, motives, behavior, emotions or intent of the petitioner either at the time of her two interviews with him or at the time he applied for the loans in December 1954. She was not asked for nor did she state any diagnosis of the petitioner.

It is settled law that, in admitting expert testimony, a factual basis, hypothetical or otherwise, for the opinion or conclusions of the expert must be indicated. *United States* v. *Alker*, 260 F. 2d 135, 155 (C.A. 3), cer-

tiorari denied, 359 U.S. 906; *Carpenter* v. *United States*, 264 F. 2d 565, 570–571 (C.A. 4), certiorari denied, 360 U.S. 936; *Blunt* v. *United States*, 244 F. 2d 355, 364–365 (C.A. D.C.); *Tri-Angle Club, Inc.* v. *United States*, 265 F. 2d 829, 832 (C.A. 8); *Greenbaum* v. *United States*, 80 F. 2d 113, 121 (C.A. 9). The basis for Dr. Owen's conclusions was especially significant here since one of the defenses which petitioner advanced at the trial was that his conduct was authorized by a power of attorney from Dr. Glen Dowell (Tr. 139, 144, 149–150, 157–158, 169–171, 175–177, 215–218, 222–223, 239, 241, 253–255), and one possible interpretation of Dr. Owens' testimony was simply that she believed that claim.

2. There is no merit to petitioner's contention that he was denied a fair and impartial trial.

a. Although the court did question, for brief periods, some of the Government and defense witnesses (*e.g.*, Tr. 16–18, 30–33, 38–40, 65–66, 84–85, 142, 243, 247–248), examination of the instances cited by petitioner shows that the court's purpose was simply to clarify the testimony. The court of appeals was "satisfied from the record" that there was no basis for petitioner's complaint. It said (Pet. 39):

> Such questions as the Judge addressed to witnesses were calculated to clarify their testimony. They did not exceed reasonable limits and were not weighted against the defendant.

Moreover, the court instructed the jury that they were the exclusive judges of the facts of the case, the credibility of the witnesses, and the weight to be

honest and equally intelligent with himself or herself.

Now, as I have told you before, it is the duty of jurors to decide cases if they can conscientiously do so.

Now, return to your jury room, discuss the case fully and fairly with each other, and see if you are not able to reach a verdict.

Petitioner contends (Pet. 22) that there was no need to give this supplemental instruction because the substance of that charge was included in the court's original instructions to the jury, and that, in any event, the supplemental instruction was improper because it left the jury "with the impression that the Court insisted upon a verdict." There is no merit to the contention.

It was not improper for the court, in its supplemental instructions, to impress upon the jury their duties with regard to the case when an actual deadlock did arise. Nor was the supplemental charge coercive. The first part of that charge was taken practically verbatim from the charge which this Court approved in *Allen* v. *United States*, 164 U.S. 492, 501, while the latter portion was taken directly from the Court's rationale in *Allen*. *Id.* at 501-502. That the court gave the supplemental charge to the jury on its own motion is of no particular moment. *Weathers* v. *United States*, 126 F. 2d 118, 119-120 (C.A. 5); *Dwyer* v. *United States*, 17 F. 2d 696, 698 (C.A. 2), certiorari denied, 274 U.S. 756; *Hagans* v. *United States*, 261 F. 2d 924, 927-928 (C.A. 5). See *Allis* v. *United States*, 155 U.S. 117; *United States* v.

McGuire, 64 F. 2d 485, 493 (C.A. 2), certiorari denied, 290 U.S. 645.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM RICHARD WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys.

NOVEMBER 1960.

U.S. GOVERNMENT PRINTING OFFICE: 1960